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NEGLIGENCE IN IMMINENT PERIL.

THE well-settled rule of contributory negligence that a person cannot recover, if it appear that by the want of ordinary care and prudence on his part, he contributed to the injury, or if, by the exercise of ordinary care, he might have prevented the injury, is subject to recognised limitations. One of such limitations is, that if the plaintiff, without fault, is placed, by want of care of the defendant, in such a position that, at the moment and in the face of great and threatening peril, he is obliged to choose between two hazards, and he makes such choice as a person of ordinary prudence and care placed in the same situation might make and is thereby injured, the fact that if he had chosen the other hazard he would have escaped injury, will not relieve the defendant from liability for his own neglect: *Haff v. M. & St. L. Ry.*, 14 Fed. Rep. 558; *Collins v. Davidson*, 19 Ill. 83; *Pennsylvania Co. v. Righter*, 42 N. J. L. 180; *Stokes v. Saltonstall*, 13 Pet. 181; *Siegrist v. Arnot*, 10 Mo. App. 197; *Mark v. St. P., M. & M. Rd.*, 30 Minn. 493; *Gurry v. C., M. & St. P. Rd.*, 52 Ia. 672; *Schall v. Cole*, 107 Penn. St. 1; *Fowler v. B. & O. Ry.*, 18 W. Va. 579; *Lowery v. Manhattan Ry.*, 99 N. Y. 158; *E. T., V. & Ga. Rd. v. Gurley*, 12 Lea 46; *P., C. & St. L. Rd. v. Martin*, 82 Ind. 476; *Rd. Co. v. Mowery*, 36 Ohio St. 418; *Penn. Rd. v. Werner*, 89 Penn. St. 59; *Wilson v. N. P. Ry.*, 26 Minn. 278; *I. B. & W. Rd. v. Carr*, 35 Ind. 510; *Dyer v. Erie Ry.*, 71 N. Y. 229; *M. C. Rd. v. Neubeur*, 62 Md. 391; *Wesley Coal Co. v. Healer*, 84 Ill. 126; *Larrabee v. Sewall*, 66 Me. 376; *Stevenson*

v. C. & A. Rd., 18 Fed. Rep. 493; 5 McCrary 634; *McKinney v. Neil*, 1 McLean 540; *Coulter v. Am. Exp. Co.*, 56 N. Y. 585; *Buel v. N. Y. C. Rd.*, 31 Id. 314; *Bucher v. Rd.*, 98 Id. 128; *T., W. & W. Rd. v. O'Connor*, 79 Ill. 391; *Voak v. N. C. Rd.*, 75 N. Y. 320; *Johnson v. West Chester Rd.*, 70 Penn. St. 357; *Lawless v. Conn. R. Rd.*, 136 Mass. 1; *The B. B. Saunders*, 25 Fed. Rep. 727; *The Genesee Chief*, 12 How. 461; *The Dexter*, 23 Wall. 69, 76; *The Elizabeth Jones*, 112 U. S. 514, 526; *I., B. & W. Rd. v. Carr*, 35 Ind. 510; *Mark v. Hudson R. Bridge Co.*, 56 How. Pr. 108; *Wesley City Coal Co. v. Healer*, 84 Ill. 126; *E. T., V. & G. Rd. v. Clark*, 74 Ala. 443; *B. & O. Rd. v. Trainor*, 33 Md. 542; *Sullivan v. Bridge Co.*, 9 Bush 81; *Cottrill v. Rd.*, 47 Wis. 637.

Lord ELLENBOROUGH said, in *Jones v. Boyce*, 1 Stark. 402, "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences." To like effect, Chief Baron KELLY, in *Siner v. G. W. Ry.*, L. R., 3 Ex. 150; *The Bywell Castle*, L. R., 4 P. D. 219.

Or, in other words, where a party has given another reasonable cause for alarm he cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility resulting from the alarm: *Wesley City Coal Co. v. Healer*, 84 Ill. 126.

Nor is there any rule of law which imposes it upon one over whom danger depends by the neglect of another to incur greater danger by delaying his efforts to avoid it until its exact nature and measure can be ascertained. An instinctive effort on the part of such person to avoid the danger, will not relieve the other from responsibility for his negligence: *Lowery v. Manhattan Ry.*, 99 N. Y. 158; *Coulter v. Am. Exp. Co.*, 56 Id. 585; *Larrabee v. Sewall*, 66 Me. 376.

The limitation of the rule stated is enforced under the varying circumstances justifying its application. It is, in effect, incorporated into the maritime law of all civilized nations, and in the United States, under Rev. Stats. 1878, sect. 4233, as amended by 23 Stats. at Large, p. 442, it is provided that in obeying and construing the rules of navigation governing the movements of vessels, contained in the act, "due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from such rules necessary in order to avoid immediate danger."

The limitation is generally applied to errors of navigation by vessels made *in extremis* in attempting to avoid an impending collision. The limitation also applies to acts of passengers or employees on railroad locomotives or trains, in jumping from moving trains, done under the alarm caused by a collision of trains which is taking place or is likely to occur; and of travellers driving or on foot on public highways, when in danger, by the defendant's negligence, of collision, at a railroad crossing, with an approaching train, or upon public streets in a city, and of employees in manufactories or shops, and in other varying circumstances which, with the qualification of such limitation, will be considered in their order.

Collisions of Vessels.—The rule in Admiralty.—The general rule in admiralty, as declared by the Supreme Court of the United States, in several cases, is, that where a vessel has, either wholly or partly, by her own fault or mismanagement, placed another vessel in a position of extreme danger, the other ship will be excused, if in the moment of peril and excitement, in an effort to avoid the impending collision, she makes an error in judgment in manœuvres, contributing to, or inducing a collision: *The Elizabeth Jones*, 112 U. S. 514, 526; *The Genesee Chief*, 12 How. 461; *N. Y. & L. Steamship Co. v. Rumball*, 21 Id. 372, 383; *The Favorita*, 18 Wall. 603; *The Falcon*, 19 Id. 75; *The Nichols*, 7 Id. 656, 666; *The Carroll*, 8 Id. 302; *The Dexter*, 23 Id. 69, 76. Also by federal courts in collision cases: *The Royal Arch*, 22 Fed. Rep. 457; *The E. B. Ward, Jr.*, 23 Id. 900; *The Standard*, Id. 207; *The George Murray*, 22 Id. 117, 123; *The Nereus*, 23 Id. 458; *The B. B. Saunders*, 25 Id. 727; *Collins v. Davidson*, 19 Id. 83; *The John Mitchell*, 12 Id. 511; *Orhanovich v. The America*, 4 Id. 337; *The Alaska*, 22 Id. 548; *The Lavergne*, 2 Id. 788; *The Merrimac*, 2 Sawy. 586; *Bartlett v. Williams*, 1 Holmes 229; *Peck v. Burns*, 5 Ben. 537; *The J. H. Gautier*, Id. 469; *The Elm City*, 6 Id. 58; *The General William McCandless*, Id. 223; *The Manhasset*, Id. 301. As said by Judge McCRARY, in *Collins v. Davison, supra*, "In the case of sudden and unexpected peril, endangering human life, and causing unnecessary excitement, the law makes allowances for the circumstance that there is but little time for deliberation, and holds a party accountable only for such care as an ordinarily prudent man would have exercised under similar circumstances."

The rule applies to all cases where the situation is such that, all

the circumstances being considered, a reasonable doubt might exist as to the best course to be pursued to avoid a collision on the part of those in charge of the vessel in a dangerous situation: *The Nereus*, 23 Fed. Rep. 448, 458. But a vessel which gives a signal to another vessel for a departure from the ordinary rules of navigation assumes the hazards of the consequences of making such a departure, whether she hears a response to the signal or not: *The B. B. Saunders*, 25 Fed. Rep. 727; *The St. John*, 7 Blatchf. 220; and where a steamer, under no constraint of circumstances, proposes such departure, requiring on the part of the other vessel strong and immediate measures to avoid collision, an error of judgment made by the latter, in a moment of peril is no defence: *The Nereus*, 23 Fed. Rep. 456. So, where a vessel, instead of following such rules causes damage by a mistaken manœuvre calculated on chance, she is responsible: *The Titan*, 23 Fed. Rep. 413, 416. A change of course on the part of a vessel which complied with the rules of navigation until a collision became apparently inevitable by the fault of the other, is not a fault when made at a moment of extreme peril, and is allowable as an act *in extremis*, although if not made, there might have been no collision: *The E. B. Ward, Jr.*, 23 Fed. Rep. 900; *The George Murray*, 22 Id. 123. The rule as stated by the English Court of Appeals in the Admiralty Court in the leading case of *The Bywell Castle*, L. R., 4 Pr. D. 219, where the libelled vessel in a collision changed her course when, as said by Chief Justice JAMES, she was "in her very agony," is, that where a ship has, by wrong manœuvres, placed another ship in a position of extreme peril, that other ship will not be held to blame if, in that moment of extreme peril and difficulty she happens to do something wrong, and is not manœuvred with perfect presence of mind, accurate judgment and promptitude. "Although," added Lord COTTON, "those before whom the case comes to be adjudicated, with a knowledge of all the facts, are able to see that the course adopted was in fact not the best."

Collision of Railroad Trains.—The limitation of the doctrine of contributory negligence referred to, applies, also, to passengers upon railroad trains. The rule is applied especially in cases where collisions of railroad trains have taken place or are likely to occur, and the passenger is injured while leaping therefrom. It may thus be regarded as settled law that where a passenger is riding upon a railroad train and a collision has taken place or is likely to occur,

and in the excitement of the moment, in presence of impending peril, without time for deliberation, he is obliged to choose between two hazards, and makes such choice as a person of ordinary care and prudence would make under like circumstances, and by reason thereof he is exposed to greater peril, and injured, he is entitled to recover, the railroad company not being relieved from liability for its own negligence by the fact that the instinctive act of escape from imminent peril by jumping from a moving train was very hazardous and in law negligent, and that had he chosen the other hazard the injury would have been avoided : *N. & C. Rd. v. Erwin*, 3 Am. & Eng. R. R. Cas. 465; *Twomley v. C., P., N. & E. Ry.*, 69 N. Y. 158; *Buel v. N. Y. C. Rd.*, 31 Id. 314; *Eldridge v. Long Island Rd.*, 1 Sandf. (N. Y.) 89; *Collins v. Rd. Co.*, 12 Barb. 493; *Plopper v. Rd. Co.*, 13 Hun 625; *Southwestern Rd. v. Paulk*, 24 Ga. 356; *Wilson v. N. P. Rd.*, 26 Minn. 278; *Hill v. N. O. & G. W. Rd.*, 11 La. Ann. 292; *Rd. Co. v. Aspell*, 73 Penn. St. 149; *Knapp v. S. C. & P. Rd.*, 18 Am. & Eng. R. R. Cas. 60. See *Lowery v. Manhattan Ry.*, 99 N. Y. 158, 162.

The rule was applied where a passenger fearing a collision from an approaching train, left his seat to go out of the train, believing by so doing he could better avoid the danger, and although his act contributed to his injury, it was held no defence to his action : *Iron Co. v. Mowery*, 36 Ohio 418. And also, where, a collision impending, the conductor called to the passengers to jump, and himself set the example : *Southwestern Ry. v. Paulk*, 24 Ga. 356; or where they followed a brakeman : *Filer v. New York Central & H. R. Rd.*, 68 N. Y. 124; *Pittsburgh, B. & W. Rd. Co. v. Bohrman*, 12 Am. & Eng. R. R. Cas. 170.

The rule as to Employees.—A distinction is properly drawn between the circumstances which may justify a passenger in fear of an impending collision, to jump from a moving train, and the like act of an employee, such as an engineer. The former has only his own personal safety in question, while such employee has in his charge the lives and property of all the passengers and employees on the train. The passenger is also unskilled in the running of trains, and as to the imminence of the danger of collision. The engineer, however, knows from experience how soon a train can be stopped, and the danger of risk of collision as judged from the distances between the approaching trains. To justify jumping from his engine in such circumstances, there must be such an im-

minent emergency upon him as requires him to do it; for what would be no fault in the passenger might be gross negligence in the officers of the train: *Central Rd. v. Roach*, 64 Ga. 635. Where, however, a collision was rendered inevitable by the negligence of the employer in retaining an incompetent servant, it was held where an engineer jumped from his engine, that, "if in the excitement of the moment, the deceased lost his own presence of mind, and adopted a mode of self-preservation, which proved most unfortunate for him, it was no excuse to the company, whose negligence in employing or retaining an incompetent servant caused the disaster:" *E. T., V. & G. Rd. v. Gurley*, 12 Lea 46.

The limitation also applies in favor of an employee, where, in the course of his employment, in a position of imminent peril, by the negligence of the employer, he adopts, in the terror of the moment, an unsafe course exposing him to greater peril: *Schall v. Cole*, 107 Penn. St. 1; *Gumz v. Rd.*, 52 Wis. 672; *Schultz v. Chicago & N.W. Rd.*, 44 Id. 638; *Mark v. St. P., M. & M. Rd.*, 30 Minn. 493; *Stevenson v. Chicago & A. Ry.*, 18 Fed. Rep. 493; *Lalor v. Chicago, B. & Q. Rd.*, 52 Ill. 401; *Bell v. Hannibal & St. J. Rd.*, 72 Mo. 50.

In *Schall v. Cole*, *supra*, where the employee unexpectedly found himself in a position of imminent peril in which there was no time for reflection, by reason of the breaking of a part of a machine, the court say: "Assuming it to be true that he might have escaped had he not paused to look after his machine, such an error of judgment at such a time ought not to prevent a recovery." And, in a similar case of imminent peril, the Supreme Court of Wisconsin, in *Schultz v. Chicago & N.W. Rd.*, *supra*, held that "it would be most absurd and unjust to hold him negligent because the instinct of self-preservation did not suggest a more effectual method of escape from peril."

Collisions at Railroad Crossings.—A traveller, on a highway or a city street, approaching a railroad crossing where the view of the track is by any means obstructed so as to render it impossible or difficult to learn the approach of a train, or where there are conflicting circumstances calculated to deceive or throw him off his guard, and who is obliged to act upon his judgment at the moment of peril, caused by the defendant's negligence, in failing to give signals, and who, under such circumstances, acts as would a person of ordinary intelligence, will be entitled to recover, although at the

last moment he be guilty of an error of judgment in his attempting to avoid collision with the approaching train: *Hart v. Devereux*, 41 Ohio St. 565; *Penn. Rd. v. Werner*, 89 Penn. St. 59; *Kelly v. St. P., M. & M. Rd.*, 29 Minn. 1; *Brownell v. T. & B. Rd.*, 55 Vt. 218; *Rosenberger v. G. T. Ry.*, 8 Ont. App. 482; aff. 9 Sup. Ct. Can. 311; *Copley v. N. H. & N. Rd.*, 136 Mass. 6; *Cont. Imp. Co. v. Stead*, 95 U. S. 161; *Plummer v. Eastern Rd.*, 73 Me. 591; *Penn. Rd. v. Coon*, 17 W. N. C. 137; *P. & R. Rd. v. Killips*, 88 Penn. St. 405; *Penn. Rd. v. Beale*, 73 Id. 504; *Bunting v. Rd. Co.*, 14 Nev. 351; *L. & C. L. Rd. v. Goetz*, 79 Ky. 442; *C. B. & Q. Rd. v. Lee*, 87 Ill. 454; *P. & P. Rd. v. Clayberg*, 107 Ill. 644; *Johnson v. Rd. Co.*, 77 Mo. 546; *Richey v. Rd.*, 7 Mo. App. 150; *Zimmerman v. Rd. Co.*, 71 Mo. 476; *Gaynor v. Rd. Co.*, 100 Mass. 208; *Chaffee v. Rd. Co.*, 104 Id. 108; *Pollock v. Rd. Co.*, 124 Id. 158; *Kissenger v. Rd. Co.*, 56 N. Y. 538; *W., St. L. & P. Rd. v. Cent. Trust Co.*, 23 Fed. Rep. 738; *Cosgrove v. Rd. Co.*, 87 N. Y. 88; *Salter v. Rd.*, 88 Id. 42; s. c. 75 Id. 273; *Cordell v. Rd.*, 70 Id. 119; *Dolan v. Del. & H. Canal Co.*, 71 Id. 285; *B. & O. Rd. v. Whitacre*, 35 Ohio St. 627; *Schierhold v. Rd.*, 40 Cal. 447; *Penn. Rd. v. Matthews*, 36 N. J. L. 531; *Gothard v. Rd.*, 67 Ala. 114; *Nehrbas v. Rd.*, 62 Cal. 320; *Faber v. Rd.*, 29 Minn. 465; *Trout v. Rd.*, 23 Gratt. 619; *H. & T. C. Rd. v. Wilson*, 60 Tex. 142; *Funston v. Rd.*, 61 Ia. 452; *Skelton's Case*, L. R., 2 C. P. 631; *Bilbee v. L. & B. Ry.*, 18 C. B. N. S. 584. Even in the absence of statutory requirement to give signals: *Artz v. C., R. I. & P. Rd.*, 34 Iowa 153; *Funston v. C., R. I. & P. Rd.*, 61 Id. 452; *Eilert v. Rd.*, 48 Wis. 606.

And also at private crossings where the same have been opened to the use of the public: *Webb v. Rd.*, 57 Me. 117; *P., F. W. & C. Ry. v. Dunn*, 56 Penn. St. 280; *Delany v. Rd.*, 33 Wis. 67; *Thomas v. Rd.*, 8 Fed. Rep. 729; s. c. 19 Blatchf. 533; *Barry v. Rd.*, 92 N. Y. 289; *Delaney v. Rd.*, *supra*; *Jamison v. Rd.*, 55 Cal. 593; *Murphy v. Rd.*, 133 Mass. 121. Even where the company had put up a sign "This is not a public way, and is dangerous:" *O'Connor v. B. & L. Rd.*, 135 Mass. 352; *Ill. Cent. Rd. v. Frelka*, 110 Ill. 498.

A traveller upon a street in a city, where the speed of trains has been regulated by city ordinance, may presume that the company will comply with such regulation, and if, acting in accordance with

such presumption, in the absence of knowledge that the train approaching was exceeding that speed, he will be excused, in case of collision, if by reason of haste, when placed in a position of impending peril, by the defendant's negligence, he makes a mistake: *Hart v. Devereux*, 41 Ohio St. 565; *Meek v. Pennsylvania Co.*, 38 Id. 632; *E. T., V. & G. Rd. v. Clark*, 74 Ala. 443. He also may presume that a proper lookout will be kept in backing locomotives or cars across streets: *L., N., A. & C. Rd. v. Head*, 80 Ind. 117; *G. H. & H. Rd. v. Moore*, 59 Tex. 64; *Gov. St. Ry. v. Hanlon*, 53 Ala. 83; *Schwier v. N. Y. C. & H. R. Rd.*, 90 N. Y. 558. And where, in obedience to signals or acts of the company's servants at crossings, a traveller places himself in a position of imminent danger of collision, he can recover: *Flushing v. Sharp*, 96 N. Y. 676; *Peck v. M. C. Rd.* (Mich. 1885), 19 Am. & Eng. Rd. Cas. 259; *Bayley v. Eastern Rd.*, 125 Mass. 62; *Sweeny v. Old Col. Ry.*, 10 Allen 368; *Borst v. L., S. & M. S. Rd.*, 4 Hun 346; *Dolan v. D. & H. Canal Co.*, 71 N. Y. 285; *P. & O. Rd. v. Mahone*, 63 Md. 138.

The limitation of the rule stated was enforced in *C. & N. W. Rd. v. Miller*, 46 Mich. 532. The court (Ch. J. MARSTON), in stating the rule said: "If the neglect of the company to sound a whistle, when approaching the highway, permitted the plaintiff to drive into a dangerous position under circumstances which allowed him no time for reflection, and he, acting upon the spur of the moment in his efforts to avoid the danger, made a mistake, and took what subsequent cool deliberate investigation might show to have been wrong, and that some other course would have been better if not absolutely safe, yet he cannot be charged with contributory negligence because of such error of judgment under such dangerous circumstances." And in a late case in Mass. (*Tyler v. N. & N. E. Rd.*, 137 Mass. 238), arising under similar circumstances, the court held that while "the plaintiff was bound to use reasonable care to avoid getting into a position in which he could not escape a collision, the fact that he did find himself there in such a position was not conclusive evidence that he was there by his own negligence:" *Mayo v. Railroad Co.*, 104 Mass. 137. In that case, even the defendant, did not claim that the act of the traveller, in presence of the imminent peril of collision, although negligent, was a defence; and, in *Schum v. Penn. Ry.*, 107 Penn. St. 8, where the view of the road was obscured until about ten yards from the track, and then only

fifty yards of the track could be seen, the train running forty miles an hour, and giving no signals, and the plaintiff's intestate was killed, the court announced that "as matter of law, a man may fairly be presumed to see what he can see when it is his duty to see it, but he cannot be presumed to see at a particular time what is not shown to have been visible at that time." Nor is a degree of care amounting to the utmost coolness and discretion required of travellers finding themselves in positions of peril, by reason of impending collisions caused by the view of the approaching train, being prevented by obstructions placed by the defendant, no signals having been given: *Nehrbas v. Rd.*, 62 Cal. 330; *Rd. Co. v. Sponier*, 85 Ind. 165; *McDermott v. Rd.*, 28 Hun 325; *MacKay v. Rd.*, 35 N. Y. 75; *Dimick v. Rd.*, 80 Ill. 338; *Rd. v. Lee*, 87 Id. 454. And it may be negligence *per se* on the part of a railroad to have a crossing so obstructed that if the plaintiff "had got out and led his horse on the track, the result would have probably been the loss of his own life as well as that of the horse:" *Penn. Rd. v. Ackerman*, 74 Penn. St. 265. Nor is it required of travellers on the highway to measure time and distance with exactness as they approach a crossing, although upon a subsequent measurement by an experienced engineer it may be discovered that an engine might have been seen at certain points in the highway: *Hutchinson v. St. P., M. & M. Rd.*, 32 Minn. 398; nor was it any defence that a girl might have been misled as to distance where she had got to within four or five feet of the track, at a city street crossing, without seeing or hearing a train, and then, being startled by sudden and sharp whistles and seeing the flashing head-light of an engine, in the terror of the moment, without time for reflection, started to run across the track, in front thereof, and was injured: *Copley v. N. H. & N. Rd.*, 136 Mass. 6. So, also, a traveller can recover where, having a right to presume that a railroad company will not exceed the rate of speed prescribed by ordinance, and acting upon such presumption, without knowledge that the rate was being exceeded, was injured while attempting to escape from the perilous position, in which he had been placed by the defendant's negligence: *Hart v. Devereux*, 41 Ohio St. 565; *Meek v. Pennsylvania Co.*, 38 Id. 632; *E. T., V. & G. Rd. v. Clark*, 74 Ala. 443.

Jumping off a moving Train at Stations.—A passenger upon a railroad train who, by the culpable negligence of a corporation,

through its officers, is induced to leave a train while moving slowly, it having arrived at his destination, but not being entirely stopped, is entitled to recover, for, being called upon to act in a sudden emergency caused by the defendant's negligence, he will not be held to the most rigid accountability for his actions: *Bucher v. Rd.*, 98 N. Y. 128; *Filer v. N. Y. C. Rd.*, 49 Id. 51; *Ernst v. Hudson River Ry.*, 35 Id. 38; *McIntyre v. N. Y. C. Rd.*, 37 Id. 287; *G., H. & S. A. Rd. v. Smith*, 59 Tex. 406; *Penn. Rd. v. McCloskey*, 23 Penn. St. 526; *Georgia Ry. Co. v. McCurdy*, 45 Ga. 288, in which it is said, "it is not a want of ordinary care for a passenger to use the means the company affords him to get off a train:" *Straus v. Rd.*, 75 Mo. 185; *Vickers v. Rd.*, 64 Ga. 306; *Clotworthy v. H. & St. J. Rd.*, 80 Mo. 220; *Boss v. Rd.*, 15 R. I. 135; *M. & L. R. Rd. v. Stringfellow*, 44 Ark. 32; *T. & P. Rd. v. Garcia*, 62 Tex. 285; *Kelly v. Rd.*, 70 Mo. 604; *Nelson v. Rd.*, 68 Id. 593; *Ohio & M. R. Rd. v. Schiebe*, 44 Ill. 460; *Edgar v. Ry.*, 11 Upp. Can. App. 452; *Siner v. Rd.*, L. R., 3 Exch. 150, 155; *Rd. v. Krouse*, 30 Ohio St. 222; *Ill. Cent. Rd. v. Able*, 59 Ill. 131; *P., B. & W. Rd. v. Rohrman*, 12 Am. & Eng. Rd. Cas. 176. Or where passing from one car to another while in motion, upon the directions of the employees of the train, there being no knowledge that such obedience would lead to danger: *L. & N. Rd. v. Kelly*, 92 Ind. 371. The rule applies where a conductor gives a signal for a train to start, while passengers are getting off of the train, at a station, without notice to them: *Brooks v. Rd.*, 135 Mass. 21; *Rathbone v. Union Ry.*, 13 R. I. 709; *Bucher v. Rd.*, 98 N. Y. 128; *Straus v. Rd.*, 75 Mo. 185; *Rd. v. Krouse*, 38 Ohio St. 222.

The rule applied to Stage-Coaches and other Vehicles.—The rule referred to ante-dated railroads, for the situation of imminent peril that will excuse a person for jumping from a railroad train in motion will equally excuse him where he leaps from a coach or other vehicle while in motion. In the leading case—*Stokes v. Saltonstall*, 13 Pet. 181—where a passenger jumped from a stage, fearing that it would overturn, the court stated the rule: "It is sufficient, if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt one alternative, leap or remain in certain peril: *Haff v. Rd.*, 14 Fed. Rep. 558; *McKinney v. Nere*, 1 McLean 540; *Ingalls v. Bills*, 9 Metc. 1; *Seigrist v. Arnot*, 10 Mo. App. 197; *Dyer v. Erie Ry.*, 71 N. Y.

228 ; and in *Jones v. Boyce*, 1 Stark. 402, the leading English case, Lord ELLENBOROUGH, says : "If I place a man in such a position that he must adopt a perilous alternative, I am responsible for the consequences."

As to occurrences on Streets.—The limitation of the rule of negligence stated is also applied to occurrences on public streets in cities and towns. In a late case in the New York Court of Appeals—*Lowery v. Manhattan Ry.*, 99 N. Y. 158—where, by the fall of fire from a locomotive on the defendant's road, the plaintiff was injured, the court (Judge MILLER), say : "The driver was passing along in pursuit of his customary business driving his horse, when suddenly the falling of the fire upon himself and the horse placed him in a position of great danger, and he was justified in attempting to save his own life and protect himself from injury. If he made a mistake in his judgment, the company was not relieved from liability." The same rule was applied in earlier cases, *Wasmer v. Delaware, L. & W. Rd.*, 80 N. Y. 212, and *Coulter v. Am. M. U. Exp. Co.*, 56 N. Y. 585, and also in *Larrabee v. Sewall*, 66 Me. 376.

A presumption prevails in favor of the foot traveller on the street that he will not, without fault, be placed in peril ; and, therefore, it is not negligent for him, in the absence of notice of danger, to permit his attention to be drawn from the spot upon which he is about to step, extraordinary vigilance not being required of him : *Houston v. Traphagen*, 47 N. J. L. 23 ; *Philbrick v. Niles*, 25 Fed. Rep. 265 ; *Coulter v. Am. M. U. Exp. Co.*, 56 N. Y. 585.

The rule was also applied to a highway, where a traveller, owing to the negligence of the defendant, was exposed to peril by a precipice left unguarded : *Pittsburgh, C. & Y. Rd. v. Moses*, 17 W. N. C. 76.

Limitation of rule, when avoided.—It is necessary, however, that the situation of peril in which the plaintiff is placed, in order to make his act while there an excusable error of judgment, must be the result of the negligence of the defendant : *The Elizabeth Jones*, 112 U. S. 514, 526. Where, therefore, the plaintiff has, by his own negligence, placed himself in a position of known peril, or where the act of the plaintiff causing his injury resulted from a rash apprehension of danger which did not exist, then, although

in the excitement and confusion, he makes a mistake in his attempt to escape from impending peril, and is exposed to greater danger, the consequences of such mistake cannot be visited upon the defendant, for no degree of presence of mind nor want of it has anything to do with the case, as it was negligence to be there: *Merrill v. Eastern Rd.*, 139 Mass. 238; *B. & P. Rd. v. Jones*, 95 U. S. 439; *Stokes v. Saltonstall*, 13 Pet. 181; *Collins v. Davidson*, 19 Fed. Rep. 83; *Kresanowski v. Rd.*, 18 Id. 229; *Player v. Rd.*, 62 Ia. 723; *L. R. & F. S. Rd. v. Miles*, 40 Ark. 298; *Rucker v. Rd.*, 61 Tex. 499; *Penn. Rd. v. Langdon*, 92 Penn. St. 21; *Gardner v. Rd.*, 51 Conn. 143; *Hickey v. Rd.*, 14 Allen 429; *Ken. Cent. Ry. v. Thomas*, 79 Ky. 160; *Waterbury v. Rd.*, 21 Blatchf. 314; 17 Fed. Rep. 671; *Abend v. Rd.*, 111 Ill. 202; *Rd. v. Michie*, 83 Id. 427; *Hoar v. Rd.*, 70 Me. 65; *Deville v. Southern Pac. Ry.*, 50 Cal. 383; *B. & M. R. Rd. v. Rose*, 11 Neb. 177; *Eaton v. Rd.*, 57 N. Y. 382; *Siegrist v. Arnot*, 10 Mo. App. 197. The rule applied in admiralty cases: *The Free State*, 91 U. S. 200; *The General U. S. Grant*, 6 Ben. 465; *Sherman v. Mott*, 5 Id. 372; *The Adriatic*, 107 U. S. 512; *The Pilot*, 20 Fed. Rep. 860; *The Eleanora*, 17 Blatchf. 88; *The Rosedale*, 22 Fed. Rep. 737; *The Bermuda*, 10 Ben. 693; *Winter v. Winnett*, 1 Holmes 465; *The Electra*, 6 Ben. 189; *The F. W. Gifford*, 7 Biss. 249.

Although circumstances may arise where a person may, voluntarily and without actual necessity, expose himself to danger, and still not be chargeable with contributory negligence: *Jeffrey v. Rd.*, 56 Iowa 546; *Pool v. Rd.*, 53 Id. 657; *Lawless v. Rd.*, 136 Mass. 1; *Thomas v. W. U. Tel. Co.*, 100 Id. 156; *Mahoney v. Metropolitan Rd.*, 104 Id. 73.

The rule stated is applied to accidents from collisions at railroad crossings. The consensus of judicial opinion in the federal and state courts is, recognising that a railroad crossing is a dangerous place, that a traveller who drives or walks upon a railroad track, without taking any precaution whatever, either to stop, look both ways, or listen for an approaching train, and is injured, is guilty of negligence in law, although the company omitted to give the statutory signals, and that the traveller, in his confusion, in the excitement of the moment, rushed more heedlessly into greater peril: *Schofield v. C. M. & St. P. Rd.*, 8 Fed. Rep. 488; *Cont. Imp. Co. v. Stead*, 95 U. S. 161; *Thomas*

v. *Rd.*, 8 Fed. Rep. 729; 19 Blatchf. 533; *Tucker v. Duncan*, 9 Fed. Rep. 867; *Wheelwright v. B. & A. Rd.*, 135 Mass. 225; *Chaffee v. B. & L. Rd.*, 104 Id. 108; *Tully v. Fitchburg Ry.*, 134 Id. 499; a case of deaf-mute: *Ormsbee v. B. & P. Rd. Corp.*, 14 R. I. 102, 108; *N. O. Rd. v. Mitchell*, 52 Miss. 808; *Laverenz v. C., R. I. & P. Rd.*, 56 Iowa 689; *Curtin v. C., R. I. & P. Rd.*, 57 Id. 316; *Benton v. Cent. Rd.*, 42 Id. 192; *P. C. & St. L. Rd. v. Yundt*, 78 Ind. 373; *S. & N. Ala. Rd. v. Thompson*, 62 Ala. 494; *Wilds v. H. R. Rd.*, 24 N. Y. 430; *Belton v. Baxter*, 54 Id. 246; *Wendell v. N. Y. C. & H. R. Rd.*, 91 Id. 420; *Connelly v. Rd.*, 88 Id. 346; *Parker v. W. & W. Rd.*, 86 N. C. 221; *P. & R. Rd. v. Boyer*, 97 Penn. St. 91; *Penn. Rd. v. Fortney*, 90 Id. 324; *R. & C. Rd. v. Ritchie*, 102 Id. 425; *Moody v. The P. Ry.*, 68 Mo. 470; *Mahlan v. Rd.*, 49 Mich. 585; *Penn. Co. v. Righter*, 42 N. J. L. 180; *Telfer v. N. Rd.*, 30 Id. 188; *M. & E. Rd. v. Haslan*, 33 Id. 147; *Murray v. Rd.*, 31 La. Ann. 490; *C. & N. W. Rd. v. Dimick*, 96 Ill. 42; *C., B. & Q. Rd. v. Damerell*, 81 Id. 450; *C. & N. W. Rd. v. Hatch*, 79 Id. 137; *Abbett v. Rd.*, 30 Minn. 482; especially, where knowing of the immediate proximity of the train: *Kelley v. Rd.*, 75 Mo. 138; *Pakalinsky v. N. Y. C. & H. R. Rd.*, 82 N. Y. 424; *Ernst v. Rd.*, 35 Id. 9; *Palys v. Erie Ry.*, 30 N. J. Eq. 604; *Parker v. W. & W. Rd.*, 86 N. C. 221; or where using a private crossing: *Johnson v. L. & N. Rd.* (Ky. 1883) 13 Am. & Eng. Rd. Cas. 623; *Cordell v. N. Y. C. & H. R. Rd.*, 75 N. Y. 330. And it is held necessarily fatal to an action, if a traveller approaches a dangerous crossing at such speed as to be unable to stop his horses before getting on the track, as he does it at his own peril of being injured by a collision with an approaching train. In doing so, he not only rashly risks his own life and property, but puts into jeopardy the lives of the passengers and employees on the approaching train: *Tucker v. Duncan*, 4 Woods 652; *Wilds v. H. R. Rd.*, 24 N. Y. 430; *Grippen v. N. Y. C. Rd.*, 40 Id. 34; *Haring v. N. Y. & Erie Ry.*, 13 Barb. 9; *Glendening v. Sharp*, 22 Hun 78; *Salter v. U. P. Rd.*, 13 Id. 187; *Mantel v. C., M. & St. P. Rd.*, 33 Minn. 62; *U. P. Ry. v. Adams*, 33 Kan. 427; *Fletcher v. A. & P. Rd.*, 64 Mo. 484; *Benton v. Central Ry.*, 42 Iowa 193; *L. S. & U. S. Rd. v. Miller*, 25 Mich. 274; *Grows v. M.C. Ry.*, 67 Me. 100; *W., St. L. & P. Ry. v. Hicks*, 13 Ill. App. 407; especially, where driving a horse at the rate of a mile in four

minutes : *Flemming v. W. P. Ry.*, 49 Cal. 253. Even where a traveller, driving at a brisk trot, trusted to the statutory signals to warn him of an approaching train : *Turner v. H. & St. J. Rd.*, 74 Mo. 603. But in a late case, *Tyler v. N. Y. & N. E. Rd.*, 137 Mass. 238, in which it was claimed that the plaintiff had no right to go so near the track that he could not stop before reaching it, until he had assured himself there was no danger, the court (W. ALLEN, J.), said : "The true proposition is, that the plaintiff was bound to use reasonable care to avoid getting into a position in which he could not escape a collision. The fact that he did not find himself in such a position is not conclusive evidence that he was there by his own negligence. * * * Whether he used due care to know if a train was coming, and to be in a condition to avoid it, were questions which depended upon inferences of fact to be found by the jury." The employees of the company may act upon the presumption that a traveller seen approaching a railroad crossing will not heedlessly expose himself to known peril by attempting to cross in front of the train : *M. C. Rd. v. Neubeur*, 62 Md. 391; *Parker v. Rd.*, 86 N. C. 221; *Telfer v. N. Ry.*, 30 N. J. L. 188.

The rule that a person who voluntarily and without necessity exposes himself to a known danger, although the danger be increased by the act of such person in the face of impending peril, cannot recover, is also applied to trespassers upon the tracks of railroads. A person enters upon such tracks at his peril ; the company having an exclusive right of way, and being under no obligations to intruders upon it. The company has a right to presume that no one without right will be upon its track, and also to presume that if any person is seen upon the same that he will leave it at the last moment, at least, and this until possibly too late to avoid collision. If, however, the injury, even to a wrongdoer, be inflicted wilfully or wantonly, or by gross carelessness under the circumstances of the case, then, although negligent, the plaintiff may recover : *Mason v. Rd.*, 27 Kans. 83; *Logan v. Rd.*, 77 Mo. 663; *Mulherrin v. Rd.*, 81 Penn. St. 366; *Pennsylvania Rd. v. Hummell*, 44 Id. 379; *State v. B. & P. Rd.*, 58 Md. 221, 482; *Pennsylvania Rd. v. Sinclair*, 62 Ind. 309; *McCarty v. Del. & H. Canal Co.*, 17 Hun 74; *Rounds v. Del., L. & W. Ry.*, 64 N. Y. 129; *Johnson v. Rd.*, 125 Mass. 75; *Lovett v. Rd.*, 9 Allen 557; *Murphy v. Rd.*, 38 Iowa 539; *Colorado Central Rd. v. Holmes*, 5 Col. 197; *South Western Rd. v. Hankerson*, 61 Ga. 114; *Ill. Cent. Rd. v. Hetherington*, 83 Ill. 510;

Carter v. Rd., 19 S. C. 20; *H. & T. C. Rd. v. Smith*, 52 Tex. 178; *B. & O. Rd. v. Sherman*, 30 Gratt. 602; *Herring v. Rd.*, 10 Ired. L. 402; *Manly v. Rd.*, 74 N. C. 655; *McClelland v. Rd.*, 94 Ind. 276. Especially where walking on trestle-bridges: *Mason v. Rd.*, 27 Kans. 83; *Tennenbrock v. Rd.*, 59 Cal. 269; *Rd. v. Greene*, 19 Am. & Eng. Rd. Cas. 95 (Ky., 1884). Even where upon the track at the sufferance or with the permission of the company, they are subject to all the risks incident to so hazardous an undertaking: *J. M. & I. Rd. v. Goldsmith*, 47 Ind. 43; *McLaren v. Rd.*, 8 Am. & Eng. Rd. Cas. 217; *Hogan v. Rd.*, 59 Wis. 139; *Fitzpatrick v. Fitchburg Rd.*, 128 Mass. 13; *Austin v. Rd.*, 91 Ill. 35; *O'Donnell v. Rd.*, 7 Mo. App. 190.

And the presumption applies to deaf mutes, unless their misfortune be known to the employees of the train: *Zimmerman v. Rd.*, 71 Mo. 476; *Cogswell v. Rd.*, 6 Or. 417; *Rd. v. McLaren*, 62 Ind. 566; *Laicher v. Rd.*, 28 La. Ann. 320; *L. & N. Rd. v. Cooper*, 6 Am. & Eng. Rd. Cas. 5 (Ky. 1882); *Purl v. Rd.*, 79 Mo. 168; or to insensible or drunken men: *Ill. Cent. Rd. v. Hutchinson*, 47 Ill. 408; *South Western Ry. v. Johnson*, 60 Ga. 667; *Dinwiddie v. Rd.*, 9 Lea 309; *Yarnall v. Rd.*, 75 Mo. 575; *Rd. v. Sympkins*, 54 Tex. 614.

The limitation of the rule stated also applies where a person voluntarily, and without necessity, jumps from or upon a railroad train while in motion. The general rule is, in such cases, that one who is guilty of such disregard of life and personal safety will, by his own rashness, defeat a recovery, although he may honestly believe that he will not be injured in so doing, it being, nevertheless, negligence to take such risk: *McCorkle v. Rd.*, 61 Iowa 555; *N. & C. Rd. v. Smith*, 9 Lea 470; *Cent. Rd. v. Letcher*, 69 Ala. 106; *Secor v. Rd.*, 10 Fed. Rep. 15; *Dougherty v. C.*; *B. & Q. Rd.*, 86 Ill. 467; *O. & M. Rd. v. Stratton*, 78 Id. 88; *L. & M. S. Rd. v. Bangs*, 47 Mich. 470; *Rd. v. Hendricks*, 26 Ind. 228; *Knight v. Pontchartrain Ry.*, 23 La. Ann. 462; *Hubener v. Rd.*, 23 Id. 492; *Harvey v. Eastern Ry.*, 116 Mass. 269; *Hickey v. Rd.*, 14 Allen 429; *Rd. v. Schaufler*, 75 Ala. 136; *I. & G. N. Rd. v. Hassell*, 62 Tex. 256; *C. W. & M. Rd. v. Peters*, 80 Ind. 168; *Rd. v. Krouse*, 30 Ohio St. 222; *St. L., I. M. & S. Rd. v. Cantrell*, 37 Ark. 519; *C. & A. Rd. v. Randolph*, 53 Ill. 510; *Jeffersonville Rd. v. Swift*, 26 Ind. 459; *Lambeth v. N. C. Rd.*, 66 N. C. 494; *Kline v. C. P. Rd.*, 37 Cal. 400; *Doss v. M., K. & T. Ry.*, 59 Mo. 27; *Swigert*

v. H. & St. J. Rd., 75 Id. 425; *Morrison v. Erie Ry.*, 56 N. Y. 302; *G., H. & S. A. Rd. v. Smith*, 59 Tex. 406; especially where a passenger steps off a moving train contrary to the warning of train employees: *Jewell v. Rd.*, 54 Wis. 610. Nor will a passenger be justified in exposing himself to such peril upon the command, direction or advice of a conductor or other official on the train, be it ever so plain and unambiguous. In such a case the passenger should, instead of complying, disobey such command or disregard such advice, for otherwise his rashness in exposing himself to visible danger will defeat recovery in any case: *Southwestern Ry. v. Singleton*, 66 Ga. 252; s. c. 67 Id. 306; *St. L., I. R. & S. Rd. v. Cantrell*, 37 Ark. 519; *Rd. v. Krouse*, 30 Ohio St. 222; *C. B. & Q. Rd. v. Hazzard*, 26 Ill. 373; *J. & C. Rd. v. Hendricks*, 26 Ind. 228.

WILLIAM COLEBROOKE.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

BENTLEY *v.* LAMB.

The duty to perform a positive promise which is not contrary to law or to public policy, or obtained by fraud, imposition, undue influence, or mistake, is an obligation in morals, and being so, it is a sufficient consideration for an express promise.

A. gave to B., who had been employed by him for a number of years as sales-lady, a due-bill for \$3000, payable within one year after his death. This due-bill was given in pursuance of an agreement wherein he agreed to give her the same, and stated that it was for additional compensation for services rendered. A. died, and his executors, on suit being brought on the due-bill, set up want of consideration. *Held*, that the services rendered, although partly paid for, were sufficient consideration for the due-bill.

ERROR to Common Pleas No. 1, Philadelphia county.

Assumpsit by Julia W. Lamb against William K. Bentley and Elizabeth Green, executors of John B. Green, deceased, upon a due-bill for \$3000, given by decedent to plaintiff. The action was upon the following due-bill:

“Philadelphia, April 5th 1883.

“Due Miss Julia W. Lamb, three thousand dollars, additional compensation as sales-lady in my store, No. 728 Spring Garden street, payable one year after my decease, by my executors or administrators to be paid out of my estate. If Miss Julia W. Lamb dies before it becomes due, the money will revert back to the estate.

[Signed] JOHN B. GREEN, 728 Spring Garden Street.”